and there is no evidence that competing carriers would need to undertake any additional cost in order to carry local traffic on their special access lines. At least as significant is the fact that CLECs were serving a much greater number of their high-capacity customers over their own facilities (88 million voice-grade equivalents) than over UNEs (7.8 million voice-grade equivalents served by UNE and resale combined). It is impossible to find any support for a finding of impairment in light of such figures.

It is also important to recognize that CLECs use special access, purchased under tariff from the ILEC, not only to serve their largest enterprise customers, but also to serve a wide variety of small businesses. Evidence compiled by Verizon indicates that CLECs routinely use special access to serve a wide variety of small businesses, including antique dealers, book stores, dry cleaners, florists, gas stations, and hair dressers.[251] Ninety-three percent of the DS-1 loops and 98 percent of the DS-3 loops purchased from Verizon by CLECs were obtained under special access tariffs, rather than as UNEs, but they were typically purchased at volume and term discounts of 35 to 40 percent off the tariffed base rate.[252] Moreover, Time Warner has indicated that it uses special access rather than UNEs to reach customers who are not on its network.[253]

In Qwest's region, special access facilities are available everywhere, despite the predominantly rural character of the region, and they are in actual use by competitive carriers in virtually every wire center. There are 1213 wire centers in the Qwest region, of which slightly more than half (688) are in MSAs, while 525 are outside MSAs. Despite the relatively small size of Qwest's wire centers, various parts of special access circuits are currently purchased in at

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[251] *UNE Fact Report*, § III, p. 39, *citing* Letter to Marlene H. Dortch, FCC, dated July 2, 2004, from Michael Glover, Verizon, filed in CC Docket Nos. 01-338 *et al.*, at pp. 18-19, Attachment 14.

[252] Letter to Marlene H. Dortch, dated July 28, 2004, from Dee May, Verizon, filed in CC Docket No. 01-338., *et al.*, at Attachment, page 1 ("Verizon July 28 *ex parte*").

[253] *Id.*

least [redacted] In its ILEC region, Qwest sells [redacted] and [redacted]. These facilities are used by wholesale carrier-customers to compete with Qwest's retail services being purchased by business customers.

Both in general nationwide, and in Qwest's region, tariffed special access facilities are clearly a readily available alternative to UNE high capacity loops and transport and are routinely used by CLECs, in a highly competitive business environment, to provide service to business customers. A reasonably stable CLEC would not be impaired in offering such service to business customers without UNE loops, given the ready availability and actual use of tariffed special access facilities throughout Qwest's region as a substitute for this network element. Under the test set forth in *USTA II,* that establishes as a matter of law that CLECs are not impaired by not having access to high capacity loops as UNEs.[254] A nationwide finding of non-impairment is warranted with respect to high-capacity loops on this basis alone, except for those few (if any) locations where they are not available under special access tariffs, in which case a more detailed impairment analysis would be necessary.

B. Tariffed Special Access Facilities Cannot Be Converted to UNEs Pursuant to Section 251(d)(2) as a Matter of Law

Under the 1996 Act, as described in *USTA II,* there can never be a basis for permitting the "flipping" or conversion of existing, in-use special access circuits to UNEs. This is true whether or not the Commission agrees with the more general proposition that the availability and general

[254] In addition to special access, 4-wire copper loops purchased from an ILEC under the Commission's unbundling rules are also a substitute for DS1 loops. 47 U.S.C. § 51.319(a)(1). With the use of high-bit-rate DSL ("HDSL") technology, a 4-wire copper loop can be used to provide DS1 services. Indeed, this is how the majority of DS1 services are provided by ILECs, because of the relatively low costs of this technology. *See* Newton's Telecom Dictionary at 324 (2001). CLECs can deploy the central office equipment necessary for HDSL in their collocation arrangements in the same way that they provision other types of DSL.

use of special access precludes any impairment finding with respect to the equivalent network elements, as discussed in the previous section. The Commission has made clear that transport and loop UNEs are identical to special access facilities, at TELRIC prices:

> [ILECs] routinely provide the functional equivalent of combinations of unbundled loop and transport network elements (also referred to as the enhanced extended link) through their special access offerings. Because section 51.315(b) of the Commission's rules precludes the incumbent LECs from separating loop and transport elements that are currently combined, we stated that a requesting carrier could obtain these combinations at unbundled network element prices.[255]

The fact that a carrier is already using a special access circuit in the competitive provision of any service precludes a finding of impairment and thus bars the unbundling of these facilities (and, of course, their provision as combinations of UNEs): "[C]ompetitors cannot generally be said to be impaired by having to purchase special access services from ILECs, rather than leasing the necessary facilities at UNE rates, where robust competition in the relevant markets belies any suggestion that the lack of unbundling makes entry uneconomic,"[256] and thus the existing availability and use of special access by CLECs "precludes a finding that the CLECs are 'impaired.'"[257]

As a practical matter, any competitive carrier that is using special access for interexchange traffic incurs an incremental cost at or near zero in adding local exchange traffic to its existing special access facilities.[258] As a result, a competitive carrier cannot claim that it is impaired by the cost of using an existing special access circuit under tariff for the provision of local exchange service. Carriers have been given an incentive in the past, however, to commingle a

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255 *Supplemental Order Clarification,* 15 F.C.C.R. at 9588-89.

256 *USTA II,* 359 F.3d at 592.

257 *USTA II,* 359 F.3d at 593.

258 If a given special access circuit has available capacity, that capacity can be used to carry local exchange traffic at no incremental cost. If additional special access circuit capacity is needed, the incremental cost is minimal as a proportion of the cost of the total amount of special access capacity.

minimal amount of local traffic with the interexchange traffic carried by their special access facilities in order to receive an unwarranted price break on interstate special access services, because the Commission's policies allowed them to convert special access to UNEs under such conditions.[259]

By eliminating all conversions of existing tariffed special access facilities (or parts thereof), the Commission would also eliminate, on a going-forward basis, the opportunities for arbitrage presented by allowing the use of these facilities, purchased as UNEs, to provide services that do not qualify under the impairment test for UNE purchase. While the Commission considered, but did not decide, the issue of making unbundling determinations service-by-service in the *Supplemental Order Clarification,*[260] the *USTA II* decision requires such an approach.[261] As a result, there may be services for which unbundling is required and others for which it is not required, and non-eligible traffic may not be sent over UNE facilities.[262] An approach to unbundling that complies with the statutory criteria for making impairment and unbundling determinations, as set forth in *USTA II,* will result in the end of circuit flipping, thereby eliminating the opportunities for UNEs to be used for services in which no impairment exists.

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259 *See. e.g., Supplemental Order Clarification,* 15 F.C.C.R. at 9598-9600, para. 22; *TRO,* 18 F.C.C.R. at 17354, para. 597.

260 *Supplemental Order Clarification,* 15 F.C.C.R. at 9595, para. 15.

261 *See USTA II,* 359 F.3d at 575-77 (analyzing unbundling with respect to wireless service providers). In the *TRO,* the Commission adopted a "qualifying services" test to determine eligibility for UNEs, *TRO,* 18 F.C.C.R. at 17067-77, paras. 135-153, but that part of the decision was vacated by the Court in *USTA II* because the Commission had excluded certain services from even being considered "services" for unbundling purposes, *USTA II,* 359 F.3d at 592, instead of considering whether providers of such services are impaired in the unbundling analysis. Nevertheless, the Court's discussion of wireless carriers' eligibility for UNEs requires the Commission to consideration of *impairment* based on the unique characteristics of each service.

262 Obviously some incidental long distance traffic could be lawfully transmitted over a UNE. In the past, however, CLECs and IXCs attempted to use the UNE rules primarily to reduce their interexchange access costs, clearly an inappropriate abuse of the Act and the Commission's rules.

1. Previous Conversions to EELs Should Be Cancelled

For the same reasons, all previous conversions from tariffed special access to EELs must be cancelled, because the fact of the conversion demonstrates conclusively that the loop and transport network elements involved were and are available under special access tariffs, so there can be no impairment. The absence of impairment due to the availability of special access to carriers operating in a competitive environment in the past is "evidence that similarly situated firms would be equally unimpaired going forward."[263]

In this connection, the *NPRM* incorporates by reference the record compiled in response to a BellSouth petition for waiver of the *TRO* requirement that orders for EELs be processed under the *TRO*'s revised commingling and service eligibility requirements.[264] Qwest filed comments in support of BellSouth's waiver petition stating:

> [I]t makes no sense to allow conversions of special access services to EELs and commingled circuits until there has been a finding that carriers would be impaired without the loops and transport UNEs that comprise those circuits. If anything, this rationale was strengthened by the D.C. Circuit's recent decisions in *USTA II.* It may be some time before there is a lawful impairment determination for high-capacity loops and transport. Until that time, it would be inefficient and wasteful, as well as contrary to the framework established in the *TRO*, to implement the EEL requirements.
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> . . . If the EEL requirements are implemented before the Commission makes an impairment determination, Qwest will have to develop manual processes to handle any subsequent conversions from EELs to special access circuits, EELs to commingled circuits, and commingled circuits to special access circuits. Much of this work will be unnecessary if the EEL requirements are imple-

263 *USTA II*, 359 F.3d at 593.

264 BellSouth Telecommunications, Inc., CC Dockets 01-338, 96-98, and 98-147, Petition for Waiver (filed Feb. 11, 2004); *see* Public Notice, DA-04-404 (Feb. 18, 2004).

> mented only after the Commission has made final impairment determinations. . . .[265]

Given that the D.C. Circuit has eliminated the core rationale for EELs — that tariffed special access facilities can be repriced as UNEs — by holding that the availability of special access facilities under tariff precludes obtaining those same facilities as UNEs, ILECs should not be required to convert any special access facility combinations to EELs. Under the logic of *USTA II,* there can be no lawful impairment determination for the network elements making up an EEL. Accordingly the Commission should grant the relief sought by BellSouth to all ILECs.

2. Quasi-Conversions Are Also Foreclosed as a Matter of Law

Any carrier that is using special access, and therefore is deemed not impaired and is barred from converting its special access circuits to UNEs, must also be deemed non-impaired and ineligible for obtaining additional circuits as UNEs, as well. Clearly, no impairment exists for a carrier at any location where that carrier currently uses special access circuits. The fact that the carrier has proven its ability to operate at such location using special access is conclusive as to its ability to continue doing so in the future.

Any additional loop or transport circuits that the carrier obtains from the ILEC at that location in the future would have to be obtained under special access tariffs rather than as UNEs. The total use of the new circuit will be available to the carrier in the same proportion (*i.e.,* local and interexchange) on the new circuit as is the case with respect to the existing circuit, which means that the incremental cost reasonably attributable to local traffic would be in the same proportion as is the case for the existing circuit. In the case of a carrier that currently uses tariffed

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[265] Qwest Communications International Inc., CC Dockets 01-338, 96-98, and 98-147, Comments, at 3-4 (Mar. 19, 2004) (footnote omitted).

special access circuits to reach customer premises in a given wire center, there should be, at a minimum, a presumption that that carrier is not impaired by using special access to reach additional customer premises in the same wire center that it is not currently serving.[266]

C. Dedicated Transport and High-Capacity Loops Do Not Meet *USTA II's* Standards for Impairment Because of the Existence of Facilities-Based Alternatives

The standards established in *USTA II* also require a national finding of nonimpairment for these elements, due to their availability through third-party or self provisioning.

1. General Availability of Facilities-Based Sources for Loops and Transport Justifies a Non-Impairment Finding

Non-ILEC fiber networks are typically constructed as rings connecting numerous locations, such as CLEC switches, ILEC wire centers, interexchange carriers' POPs, and high-volume customer locations, as the Commission has acknowledged.[267] Thus, a given alternative fiber network typically provides both loops and transport interchangeably. The Commission acknowledged that carriers typically provision fiber circuits at OCn capacity levels, and that circuits at lower capacity levels are then derived through channelization, using multiplexers and

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[266] If the carrier is also an interexchange carrier, that presumption should be conclusive. The Commission is entitled to assume that any interexchange carrier will predominantly carry interexchange traffic over a loop. If the carrier is not an interexchange carrier and is not affiliated with one, the carrier would be required, as part of any attempt to rebut the presumption of no impairment, to demonstrate that it had valid business reasons for not providing both local and interexchange service through teaming with an interexchange carrier or otherwise. Such a carrier could be found impaired only if its business plan is that of a reasonable, maximally efficient carrier, and the joint carriage of interexchange and local exchange traffic has clearly prevailed as the most efficient business model as a general matter.

[267] *TRO,* 18 F.C.C.R. at 17206-07, para. 370 ("When carriers self-deploy transport facilities, they typically deploy fiber rings that may connect several incumbent LEC central offices in a market. On these rings, carriers aggregate end-user traffic for backhaul to their switch, or other equipment, in a similar manner to the way in which carriers do in using incumbent LEC facilities. However, these fiber rings are often deployed to maximize the ability of competitors eventually to deploy loop facilities to connect directly buildings and customers to the transport fiber ring, without accessing unbundled loops at an incumbent LEC central office.") (footnotes omitted), 18 F.C.C.R. at 17208, para. 372 ("When carriers deploy new transport facilities, they deploy fiber optic facilities.").

demultiplexers, presenting the requested bandwidth on "the relevant interface, such as a DS3 interface."[268] Given the cost of fiber deployment, providers "routinely deploy multi-fiber cables that offer far more capacity than they can currently use,"[269] which led the Commission to conclude, correctly, that fiber deployment costs are not dependent on capacity.[270]

As a result, CLECs share the capacity of fiber, and the cost of provisioning an alternative source of fiber that is usable for both loops and transport will effectively be spread across multiple carriers desiring various levels of capacity.[271] A wide variety of alternative fiber providers offer capacity at levels down to DS-1, just as the ILECs do.[272] Moreover, if one CLEC self-provisions transport, it will lease dark fiber or lit fiber capacity to other CLECs requiring transport as well[273] — as a result, "[s]ubdividing the bandwidth offered by a fiber-optic cable isn't the exception, it's the norm. . . . Almost none of the competitive fiber already in place today would be there if it weren't straightforward and relatively cheap to subdivide the enormous capacity of the glass among multiple customers."[274] The availability of alternative fiber transport between two points does not require a single point-to-point provider, because fiber networks are typically not constructed as point-to-point networks. Instead, they are constructed to provide connections between many different locations — "the vast majority of competitive fiber networks" typically

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268 *TRO,* 18 F.C.C.R. at 17209, para. 372.

269 *UNE Fact Report,* § III, p. 28.

270 *TRO,* 18 F.C.C.R. at 17160, para. 303.

271 *UNE Fact Report,* § III, pp. 8-12.

272 *UNE Fact Report,* § III, p. 12. The accompanying tables shows that large and small operators of competitive fiber networks, such as AT&T, MCI, Cox, Comcast Business, ICG Telecom, XO, Time Warner Telecom, Looking Glass Telecom, and IDT Solutions, offer capacity down to the DS1 level or lower levels. *Id,* § III, Table 7-8 at pp. 13-14.

273 *UNE Fact Report,* § III, p. 28.

274 *UNE Fact Report,* § III, p. 1.

provide connections between multiple ILEC wire centers, CLEC switches, carrier hotels, and customer locations.[275]

These fiber networks are extensively interconnected with each other, as well, with the result that each carrier effectively gets the use of all the competitive fiber networks in any given area.[276] Moreover, it is common for third-party fiber providers as well as CLECs to sell wholesale capacity to each other,[277] and many alternative fiber providers also are willing to lease access to dark fiber.[278] As a result, a CLEC can obtain competitive loops or transport at virtually any capacity level, from DS-1 on up, even if a single operator does not have a physical route between the two locations and multiple networks must be daisy-chained together to derive the transport facility.[279]

Fiber facilities already exist in many areas, including those with the highest concentration of business customers, and these facilities are constructed as rings, with multiple radial extensions and closely spaced break-out points that can readily be tapped for later connection of a lateral extension to a customer, thus minimizing the cost and difficulty of connecting any given customer reasonably close by.[280] Given the high concentration of business customers with a need for high-capacity facilities in a limited number of areas, alternative fiber has been extensively deployed in those areas. This is readily apparent from the maps of several metropolitan areas supplied by Verizon and Qwest.[281] In Qwest's region, there are also extensive fiber facili-

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275 *UNE Fact Report*, § III, p. 5 and Table 6 at p. 6.

276 *UNE Fact Report,* § III, p. 18.

277 *UNE Fact Report*, § III, p. 18.

278 *UNE Fact Report*, § III, p. 18 and Table 11 at p. 20; *see also id.* and § III, Table 18 at p. 38 (listing local fiber networks operated by interexchange carriers that supply dark fiber).

279 *UNE Fact Report*, § III, p. 29; *see id.*, § III, Table 12 at p. 21.

280 *See, e.g., UNE Fact Report,* § III, pp. 8, 18.

281 *See* Verizon July 28 *ex parte*, Attachment; Letter to Marlene H. Dortch, FCC, from Cronan O'Connell, Qwest, dated August 20, 2004, filed in CC Docket Nos. 01-338 *et al.* Qwest has also included additional maps of alternative fiber availability in Attachment 4 to these Comments.

ties in place in areas with much less concentrated business usage, including smaller cities, towns, and rural areas.

The feasibility of a carrier obtaining alternative fiber loops or transport between two given locations does not, therefore, depend on that carrier's bandwidth needs between those two points any more than it depends on the existence of a single point-to-point network between them. Instead, it depends on the aggregate demand for fiber transport of all of the carriers and customers present at each location. That demand is substantial: fiber has been widely deployed, with some 324,000 route miles in place, including networks in 140 of the 150 largest MSAs, with the top 50 MSAs having an average of nineteen networks each.[282] Fiber is not the only alternative source for loops and transport. Wireless technologies can also be used to provision only one or more segments, such as the "missing link" to a competitive fiber network. This can be accomplished by using fixed point-to-point microwave facilities, just as they are often used by wireless carriers for carrying traffic between switches and cellsites. Another alternative that has recently become available and will increasingly be a viable option is broadband fixed wireless service using the Wi-Max standard.[283] Numerous companies offer broadband fixed wireless services of various types, permitting rapid and economical deployment of links.[284] "Today, at least

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282 *UNE Fact Report*, § III, p. 3; *see id.*, § III, Table 1 at p. 5.

283 Wi-Max, or Worldwide Interoperability for Microwave Access, refers to wide-area point-to-multipoint broadband transmission networks employing the IEEE 802.16 family of standards, which have gathered broad support. It is capable of providing data rates of up to 75 Mbps. *See Availability of Advanced Telecommunications Capability in the United States,* GN Docket 04-54, *Fourth Report to Congress,* FCC 04-208, at 19 (Sept. 9, 2004); *see also* Nancy Gohring, *It's a Wi Wi World; New Wireless Technologies Extend Connectivity Near and Far,* NETWORK WORLD, Mar. 15, 2004, at 60; Gary Legg, *Wireless Gets a Boost from WiMAX,* TechOnLine, Feb. 3, 2004, *available at* <http://www.techonline.com/community/ed_resource/33185>; *UNE Fact Report,* § III, pp. 20-21 & nn. 52-54.

284 *See UNE Fact Report,* § III, pp. 20-21 & n.53.

nine fixed wireless providers are now offering high-capacity services in at least 75 separate MSAs, including both major metropolitan areas and Tier II and Tier III cities."[285]

In sum, high-capacity loops and transport are available and being used by CLECs in a competitive business environment from a variety of sources other than UNEs, including special access, self- and third-party provisioning. including intermodal (wireless) alternatives. Under these circumstances, the Commission cannot lawfully find CLECs to be impaired by not having access to DS-1, DS-3, and dark fiber loops, as a general matter nationwide.

This is especially true in Qwest's region. Despite the nature of Qwest's territory, competition for business customers is replete throughout the territory. Maps showing some of the fiber overbuilds in its region have been filed with the Commission.[286] Qwest faces competition from CLECs; independent phone companies ("ICOs") overbuilding in Qwest's service areas; municipalities deploying telecommunications networks; and cable, wireless, and VoIP providers. As a result of this competition, Qwest's current rate of access line loss is 4% per year territory-wide.

Qwest has 212 CLECs in its territory with over 1,000 Section 252 Interconnection Agreements ("ICAs"). There are also over 475 ICOs in Qwest's region, many of whom provide facilities-based competition in Qwest's wire centers by overbuilding, generally by extending facilities into Qwest's wire centers from adjacent ICO wire centers. Most of the ICO overbuilds are in wire centers with fewer than 5,000 business lines; in many cases, ICO overbuilds have targeted businesses constituting a large proportion of the total access lines and in some cases, ICOs have entered into "exclusive" arrangements for the provision of LEC service in new developments within Qwest's wire centers. Numerous municipalities have also established fiber net-

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285 *Id.; see id.* at § III , Table 14 & App. G.

286 *See* Letter to Marlene H. Dortch, FCC, from Cronan O'Connell, Qwest, dated August 20, 2004, filed in CC Docket Nos. 01-338 *et al.*; *see also* Attachment 4 to these Comments.

works that provide overbuilt capacity that is used to serve large numbers of business access lines, often by leveraging the right-of-way permitting process to obtain fiber from CLECs or IXCs at little or no cost that is then used to provide facilities-based competition to Qwest; most of this competition is in wire centers with fewer than 5,000 access lines. In addition, cable operators throughout the Qwest region offer telephone service over their networks together with cable television and internet access, and in one case (Omaha) the cable operator has captured over [redacted] of the total access lines.[287] These companies are competing for, and serving, business telephone customers, not only residences.

In short, Qwest is experiencing overbuild competition from CLECs in rural markets, towns, and small cities throughout its region, and business customers are major targets for these operators. For example, in Spencer, Iowa; Burley, Idaho; Winona, Minnesota; and Rapid City, South Dakota, Qwest has lost a large percentage of its access lines, including business access lines, in the last four and a half years, just as it has lost substantial business and residential access lines in larger cities, such as Omaha.

Under these circumstances, the Commission must find that there is no natural monopoly-related obstacle to facilities-based competition with respect to high-capacity loops for business customers anywhere in Qwest's region. The facts prove that fiber- and cable-based competition is economically possible in rural areas, towns, and cities throughout the Qwest region, and that the provision of this service is competitive in nature. As a result, a finding of non-impairment with respect to high-capacity loops must be made throughout Qwest's territory.

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[287] Qwest Omaha Forbearance Petition, p. iii.

2. Intermodal Alternatives Preclude an Impairment Finding

The Commission correctly observed in the *TRO* that impairment must be determined with respect to a competitor in a given service using the most efficient network architecture.[288] As a result, the Commission cannot ignore the existence of network architectures that do not require the use of loop and transport network elements. If an efficient competitor does not need to rely on loops or transport, than no impairment finding can be made. The fact that some competitors may have chosen a business plan based on a less efficient architecture that relies on the use of loops and transport does not permit the Commission to find those competitors to be impaired.[289]

In particular, both fixed wireless and cable modem service can provide intermodal alternatives to the high-capacity services that small and medium sized enterprise customers obtain from either a CLEC or an ILEC. While cable operators are traditionally thought of as serving residential neighborhoods, there is considerable evidence that they are actively pursuing business customers by laying new fiber and by extending their hybrid networks to business locations. As a result, a majority of small- and medium-sized businesses are within reach of cable networks and about a quarter of them already have a cable drop.[290] Moreover, one recent study indicated that over 40 percent of large and small businesses, and 32 percent of "middle market" businesses are already using cable modem service for high-capacity home-office communications to some extent.[291] Through the use of VoIP, fixed wireless and cable operators are capable of providing

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288 *TRO*, 18 F.C.C.R. at 17303, para. 517.

289 *Id.*

290 *UNE Fact Report*, § III. p. 40 (footnotes omitted), *citing* J. Shim & R. Read, Credit Lyonnais Securities, *The U.S. Cable Industry — Act I* at 196 (Nov. 20, 2002) (estimating 2.5 million SMBs passed by existing cable infrastructure); D. Sweeney, *Cable's Plumb Position*, America's Network (July 1, 2002) (Jedai Networks, which develops equipment "intended to enable [cable] MSOs to serve business customers," estimates "that roughly 25% of businesses already have a cable drop, including many in downtown office buildings.").

291 *UNE Fact Report*, § III, p. 40, *citing* K. Burney, *et al.*, In-Stat/MDR, *Cash Cows Say "Bye-Bye": The Future of Private Line Services in US Businesses* at 19, Tables 9 & 10 (Dec. 2003).

high-capacity voice service, as well as IP-based data services, that are the equivalent of many of the services businesses purchase from more traditional telecommunications suppliers.[292] Because these competitors can provide service efficiently without reliance on network elements from ILECs, the Commission cannot find that carriers providing the types of service offered by fixed wireless and cable operators are impaired without access to loop and transport UNEs.

3. Economics of Facilities-Based Transport and Loop Alternatives

Any factual analysis of the cost of deploying facilities-based transport and loop alternatives needs to pay heed to several key principles. First, any impairment determination that is based on such cost analyses is only valid to the extent it is based on infeasibility due to natural monopoly advantages of the ILEC that make facilities-based competition wastefully duplicative. In other words, the mere fact that it costs a great deal of money to deploy a fiber network is ultimately irrelevant. Even the fact that it may cost more to deploy a fiber network or loop than it would cost to lease special access facilities at some particular usage level is irrelevant. Instead, what must be shown is either that the ILEC's natural monopoly characteristics simply preclude construction of an alternative altogether or that the ILEC has cost advantages due to natural monopoly characteristics that would render it pointless to duplicate its facilities, because the alternative facility could never overcome the ILEC's cost advantages even at the highest levels of demand. In point of fact, in the absence of such natural monopoly characteristics, it must be presumed that CLEC construction costs will be at approximately the level of TELRIC, the costing

[292] *UNE Fact Report*, § III, p. 40.

methodology that CLECs constantly insist represents the true cost of replication of an ILEC facility using efficient technology.[293]

A showing that merely compares the cost of alternative facilities to the cost of using special access does not demonstrate that alternative facilities would be wastefully duplicative of ILEC facilities with natural monopoly characteristics. Instead, it simply demonstrates that there is a crossover level of demand, based on a variety of assumptions, at which the cost of the alternative facilities equals that of using special access. Below that level of demand, it might be more economical to use special access, while above the crossover point it would be more economical to use the alternative facilities. The same kind of analysis can be made of entry into any kind of business in competition against an existing supplier — new entrants always enter a market with a lesser market share than what is held by incumbents, and such an economic fact is not relevant (at least not by itself) in an impairment analysis.[294] To demonstrate the economic futility of competing without an unbundled element, it would have to be shown that the alternative network would be more expensive than special access even if it carried all of the traffic carried on the ILEC's network between the points in question.

Moreover, any alternative network cost analysis would not only have to take into account the total demand for carriage between given locations for a single customer or carrier. A rational fiber operator would not consider only the traffic offered by a single customer, but the traffic for which it could compete, including traffic served by the ILEC, traffic served by other carriers, and

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[293] Qwest and other ILECs have long argued that TELRIC costs are dramatically understated and potentially destructive. However, if CLECs insist that they accurately measure construction costs, then they must be held to this same standard in evaluating their own construction costs. A CLEC cannot demand access to an unbundled network element at TELRIC based on the argument that TELRIC is not a true measure of its own costs.

[294] The Court in *USTA I* found the Commission's impairment analysis deficient for just this reason: "But average unit costs are necessarily higher at the outset for any new entrant into virtually any business. The Commission has in no way focused on the presence of economies of scale 'over the entire extent of the market.'" 290 F.3d at 427 (citation omitted).

potential growth in usage. Accordingly, a cost analysis needs to take into account spreading the cost of construction and operation over all of the projected potential demand that could reasonably be accommodated. This means that it is necessary to aggregate the potential traffic of all customers in a building, not just a single requesting customer, when evaluating the cost of a loop provisioned by fiber. Likewise, it is necessary to aggregate the potential traffic of all carriers present in a wire center, not just the deploying carrier, when evaluating the cost of transport. If the facility would be less expensive than special access if the cost is spread across the full spectrum of potential users, then no finding can be made that the ILEC enjoys insuperable advantages stemming from natural monopoly characteristics. If a CLEC's business plan is based on building facilities only for individual customers after they have ordered service, the plan is utterly irrational and cannot form the basis for an impairment finding.

Thus, for example, when AT&T concluded in a 2002 *ex parte* that the crossover point where fiber becomes less expensive than special access is 18 DS-3 transport circuits or 3 DS-3 loops,[295] it was effectively conceding that there was no natural monopoly and thus no impairment. Its showing acknowledged, in effect, that if the total demand for transport at a given office, or the total demand for service by *all potential customers* who could be served by a fiber loop, exceeds those levels the fiber facility could meet the total demand for less than the cost of leasing special access — and that the ILEC had no natural monopoly advantages. The fact that in some cases there may be less demand for the crossover facility than the crossover level simply means that the facility is not economically justified by the amount of customer traffic that the CLEC could attract, not that it would be wastefully duplicative of ILEC facilities with monopoly characteristics.

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[295] *See AT&T Ex Parte* at 1, 2, Att. A at 7, Att. B at 9.

The Commission cannot make an impairment finding for high-capacity loops or transport at any particular demand level based merely on the cost of deploying fiber optic facilities, even when compared to special access prices, unless it ties its cost comparison to natural monopoly characteristics of the ILEC's facilities. When the Commission in the *TRO* found that it would be too expensive to deploy alternative fiber for fewer than three DS-3 loops, for example, it erred when it failed to show that this cost was due to some natural monopoly advantage of the ILEC. The "barriers" that the Commission found could not be "overcome"[296] were simply the costs and burdens of deploying a fiber loop, whether or not the ILEC even served the location, much less had some insuperable cost advantage in doing so. Most high capacity facilities have been deployed since passage of the Act, and ILECs have no natural monopoly advantage in the construction of new high capacity facilities — loops or transport. The Commission may not declare a competitor "impaired" simply because the level of customer demand that a particular competitor is able to generate on a competitive route is insufficient to justify economically the construction of alternative facilities by that particular competitor. The issue is whether the market is suitable for competitive supply. If not, the ILEC must supply the needed network element. If the competitor is impaired by the fact that a customer does not have enough demand to warrant facilities construction, that is not the fault of the ILEC or its "natural monopoly" characteristics. If the ILEC is willing and able to provide facilities to such a carrier under special access tariffs, there is no "failure to provide" at all, much less a failure that results in any impairment.

296 *TRO*, 18 F.C.C.R. at 17170-71, para. 320.

D. There Can Be No Impairment Finding With Respect to Transport, in Particular, Due to Its Concentrated Nature

Dedicated transport — "those transmission facilities within an incumbent LEC's transport network, that is, the transmission facilities between incumbent LEC switches"[297] — is a network element that is particularly susceptible of third-party- or self-provisioning, because by its very nature it involves a concentration of traffic into a limited number of high-volume routes.

In the *TRO,* the Commission stated:

> Competing carriers generally use interoffice transport as a means to aggregate end-user traffic to achieve economies of scale. They do so by using dedicated transport to carry traffic from their end users' loops, often terminating at incumbent LEC central offices, through other central offices to a point of aggregation.[298]

In other words, transport is a network element for which numerous CLECs, as well as wireless carriers and some IXCs, will have substantial demand and which entails highly concentrated, high-volume traffic. This is an ideal application for deployment of a non-ILEC fiber network. And, as discussed above, alternative fiber networks are in fact designed to link nodes that are likely to present high-volume traffic, such as ILEC wire centers.[299] Indeed, the Commission has observed that "transport facilities generally are used to carry traffic aggregated from multiple customers, or even multiple carriers, within an incumbent LEC's network and, thus, the economics of transport facilities can be well-suited to a wholesale business."[300]

Fiber transport is a competitive business. The *TRO* found that "fiber transport facilities have been deployed by firms other than incumbent LECs with the intention of solely or partially providing wholesale transport capacity as well as dark fiber transport to other carriers. These

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297 *See TRO,* 18 F.C.C.R. at 17203-04, para. 366.

298 *Id.,* 18 F.C.C.R. at 17201, para. 361.

299 *See also TRO,* 18 F.C.C.R. at 17206-07, 17209, paras. 370, 373.

300 *Id.,* 18 F.C.C.R. at 17209, para. 373.

carriers continue to deploy local fiber facilities today."[301] It is also clear that where there is demand for competitive fiber transport, it is becoming available despite the cost of deployment.

There is no basis for analyzing transport based on capacity levels, given its concentrated nature. These distinctions[302] are inappropriate because the widespread and growing deployment of fiber transport indicates that it is possible across the nation for a reasonably financed third party, if not a given carrier, to deploy fiber transport among any given pair of ILEC central offices if there is demand for such transport. As with fiber generally, transport is typically provisioned at OCn capacity levels, and lower-capacity circuits are then readily available through channelization[303]

Transport via independent fiber is plentiful in many locations. Over three-quarters of the BOC wire centers in large MSAs that serve a significant number of business lines have at least one competitive fiber connection present today,[304] and these wire centers serve 55 percent of all business lines nationwide and 68 percent of the business lines in the largest MSAs.[305] In other words, the national norm is that a CLEC serving business customers will very likely have an alternative source of fiber-based transport currently available between any two ILEC switches and, in the minority of business-oriented wire centers without alternative fiber in place, the concentration of business traffic makes such wire centers likely candidates for future fiber deployment.[306]

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301 *Id.*, 18 F.C.C.R. at 17212-13, para. 379 (footnotes omitted).

302 Moreover, the distinctions drawn in the *TRO* among the OCn, dark fiber, DS-1, and DS-3 capacity levels for transport were based on the "uneconomic" standard that the Court found to be "open-ended" and "vague almost to the point of being empty." *USTA II*, 359 F.3d at 572.

303 *TRO*, 18 F.C.C.R. at 17208-09, para. 372.

304 The *UNE Fact Report* shows that 80 percent of SBC, BellSouth, and Qwest wire centers serving 10,000 or more business lines have at least one fiber-based CLEC collocation; for the wire centers in the seven Qwest MSAs for which data is available, 94 percent have at least one fiber-based CLEC collocation. *UNE Fact Report*, § III, pp. 30-31 and Table 17.

305 *UNE Fact Report* , § III, p. 30; *see id*, § III, pp. 7-8 and Table 4.

306 "It is . . . reasonable to conclude that other wire centers that meet this criterion [i.e., 10,000 business lines] could economically support competitive fiber as well." *UNE Fact Report*, § III, p. 30.

Accordingly, a given carrier's ability to obtain alternative transport does not depend on its own traffic level, but on the aggregate competitive carrier traffic level, and rational, well-financed companies will deploy fiber (or, where more economically efficient, fixed wireless alternatives) in response to demand that will be available to all carriers at various capacity levels. The fact that competitive suppliers have deployed, and are continuing to deploy, fiber and other wireless alternatives that provide transport capacity indicates that transport is not, in general, a network element with natural monopoly characteristics. Given the numerous sources of transport that are both readily available and widely used across the nation by CLECs in a highly competitive environment, the Commission has no alternative but to make a nationwide finding of nonimpairment with respect to all forms of high-capacity transport, from DS-1 on up.

Whether or not the Commission makes such a nationwide finding, it must find that there is no impairment with respect to transport in Qwest's region. Qwest has filed maps of independent fiber deployment in MSAs throughout its region.[307] Moreover, the widespread availability of one or more fiber collocations at wire centers large and small across Qwest's region demonstrates that there is no natural monopoly characteristic presenting an obstacle to transport deployment. As a result, the Commission cannot find impairment with respect to transport in Qwest's region.

V. THE COMMISSION SHOULD ADOPT PROCEDURES FOR A LAWFUL, RATIONAL TRANSITION AWAY FROM RULES THAT ARE EITHER INVALID OR NO LONGER JUSTIFIABLE

The FCC has adopted interim rules that would freeze the rates, terms and conditions associated with mass market switching, enterprise loops and dedicated transport until the earlier of

[307] *See* Attachment 4; Letter to Marlene H. Dortch, FCC, from Cronan O'Connell, Qwest, dated August 20, 2004, filed in CC Docket Nos. 01-338 *et al.*

six months after publication of the *Order and NPRM* in the Federal Register, or the effective date of the rules that the Commission ultimately adopts. During this time, competitors can continue to add new subscribers at these rates, terms and conditions. After that, the Commission proposes a six month transition period for any of those elements that the Commission ultimately determines is not required to be unbundled pursuant to Section 251.[308] During the transition period, the Commission proposes that the ILEC be required to lease elements that are no longer required to be unbundled at rates that continue to be based on contracts that existed as of June 15, 2004, or rates that state commissions set for such elements.[309]

As set forth in the mandamus petition filed by Qwest, USTA and Verizon, the interim and transitional rules proposed by the Commission do not comply with the court's mandate in *USTA II* and should not be enforced.[310] As that petition explains, the FCC's proposed interim rules merely reinstate rules that have been vacated by the court.[311] The rules continue to require unbundling absent any valid finding of impairment.[312] And they would require unbundling for an additional six months even after the Commission reaches a finding of "no impairment" or otherwise decides not to require unbundling, at rates which have no basis in the Act, the FCC's rules, or the record.[313]

The Commission should instead adopt the interim rules that Qwest proposed in its Petition for Rulemaking, filed March 29, 2004,[314] which the Commission has incorporated into the

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308 *Order and NPRM*, para. 29.

309 *Id.*

310 Petition for Writ of Mandamus to Enforce the Mandate of this Court, filed by Qwest Communications International inc., United States Telecom Association, and the Verizon telephone companies on Aug. 23, 2004, D.C. Circuit Case Nos. 00-1012 *et al.*

311 *Id.* at 6.

312 *Id.*

313 *Id* at 7.

314 Qwest Petition for Rulemaking, filed March 29, 2004 ("Qwest Rulemaking Petition").

record of the instant proceeding,[315] with one additional provision to address network elements (or their equivalents) that have become available through commercial agreements. In its petition, Qwest proposed the following:[316]

- Until the earlier of (1) the date on which the Commission adopts permanent rules in compliance with the D.C. Circuit's mandate, or (2) December 31, 2006, ILECs would continue offering (a) unbundled mass market switching and shared transport combined with an unbundled loop, (b) DS-1 and DS-3 dedicated transport, and (c) DS-1 and DS-3 loops;
- In recognition of the court's decision in *USTA II*, ILECs may price these elements at market-based rates, subject to the caps below;
- The market-based prices of mass market switching and shared transport for lines in a particular state will be deemed just, reasonable, and nondiscriminatory if the sum of those charges for an average line in the state does not exceed the following caps: (1) until December 31, 2004 or the adoption of permanent rules, whichever is earlier, the total price of switching plus shared transport that would have applied to the line on March 2, 2004; (2) from January 1, 2005 to June 30, 2005, or the adoption of permanent rules, whichever occurs earlier, the total price of switching plus shared transport that would have applied to the line on March 2, 2004, plus $3.00; (3) from July 1, 2005 to December 31, 2005, or the adoption of permanent rules, whichever occurs earlier, the total price of switching plus shared transport that would have applied to the line on March 2, 2004, plus $5.00; and (4) from January 1, 2006 to December 31, 2006, or the adoption of permanent rules, whichever occurs earlier, the total price of switching plus shared transport that would have applied to the line on March 2, 2004, plus $8.00;
- The market based charges for DS-1 and DS-3 dedicated transport and DS-1 and DS-3 loops will be deemed just, reasonable, and nondiscriminatory if the prices for these facilities do not exceed the prices for interstate special access or other comparable tariffed interstate service;
- ILECs could differentiate between rates for residential versus business uses, so long as the average price of switching and shared transport in a given state, weighted in proportion to the total business and residence lines of the ILEC, complies with the caps;
- The interim unbundling requirements would be under the exclusive jurisdiction of the FCC, and not subject to the Section 252 process;
- The ILEC's offering of facilities shall be set forth on its web site, and may be memorialized in a commercial agreement with another party;
- CLECs will continue to be allowed to collect access charges when they terminate long distance calls to end users served by the leased facilities; and
- ILEC charges would not be subject to any true-up.

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315 *Order and NPRM*, para. 14.

316 Qwest Rulemaking Petition, pp. 6-8.

These interim requirements are more consistent with the D.C. Circuit's mandate in *USTA II*, because they provide for the use of previously-approved tariffed rates (where available) for elements that are not subject to valid unbundling requirements, and a reasonable ceiling rate for other services that typically are not provided by tariff. And, the interim unbundling measures would be taken pursuant to Sections 201 and 202 of the Act, as opposed to Section 251, which requires a prior finding of impairment.[317] Finally, these proposed rules provide the industry with the stability it requires during this period of uncertainty.

In addition, the Commission should provide that if the functional equivalent of a requested UNE or UNE combination is, or becomes, available from the ILEC pursuant to a commercial agreement, such as the Qwest "QPP" or line-sharing agreements, that is available to all carriers on a nondiscriminatory basis, there will no longer be impairment or unbundling required for such network element. Accordingly, starting on the date set forth in the first bullet above, when such agreements are or become available, the ILEC will no longer be required to offer that network element as a UNE. ILECs should be permitted to discontinue provision of such network elements as UNEs to existing customers in accordance with the change-of-law provisions of their interconnection agreements, and the transition to network elements under commercial agreements should be governed by the terms of such commercial agreements.

VI. THE COMMISSION HAS SOLE JURISDICTION OVER CARRIER AGREEMENTS NOT MANDATED UNDER SECTION 251

As the Commission and the Court have made clear, the scope of ILECs' obligations pursuant to section 251 and 252 is circumscribed by a number of factors, most notably the impair-

317 *Id.* at 8-9.

ment criterion.[318] As discussed at greater length above, sections 251 and 252 only apply to elements and agreements that meet the statutory test. ILECs may enter into other agreements, however, related to network elements. BOCs, for example, have an independent obligation under the section 271 competitive checklist to offer certain network elements irrespective of whether those elements must be unbundled pursuant to section 251.[319] And any ILEC may agree, as a business matter, to make other network elements available that are not required to be unbundled under any statutory provision.

State jurisdiction to arbitrate, approve and require the filing of agreements is premised on section 252 of the Act, which in turn references section 251.[320] These provisions provide no authority, however, for states to approve, arbitrate, or require the filing of agreements for network elements not provided pursuant to the section 251-252 framework — whether or not provided pursuant to section 271. For the reasons discussed below, the Commission should make clear that it alone has jurisdiction over agreements to provide elements not required under section 251.

As noted above, the Commission has held and the Court affirmed that BOCs have an obligation to provide the specific network elements listed in items 4-6 and 10 of the section 271 competitive checklist, even when those elements are not required to be unbundled pursuant to section 251. Because the obligation to unbundle such elements arises under section 271 rather than section 251, it is an "independent obligation" divorced from section section 251,[321] and the Commission has sole jurisdiction over contracts for these elements.[322] In contrast to section 252, section 271 grants states no authority to review, arbitrate, or approve agreements. The states'

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318 *See supra* Section I.B.

319 *See TRO*, 18 F.C.C.R. at 17384, para. 653; *aff'd USTA II*, 359 F.3d at 590.

320 *See* 47 U.S.C. § 252(a)(1) (referencing section 251); *see also* 47 U.S.C. § 252(e).

321 *TRO*, 18 F.C.C.R. at 17384, para. 653, *aff'd USTA II*, 359 F.3d at 576 (agreeing that section 271 requires "independent unbundling" from section 251(c)(3)).

322 *See TRO*, 18 F.C.C.R. at 17384-86, paras. 653-655, *aff'd USTA II*, 359 F.3d at 576.

role under section 271 is strictly consultative, while all authority granted by section 271 is granted to the Commission.[323] The Commission alone has the authority to approve section 271 applications[324] and to enforce the provisions of such orders.[325] Thus, the Commission has sole jurisdiction over BOCs' agreements to provide the elements required in the section 271 competitive checklist, to the extent they are not required by section 251.

Similarly, if an ILEC elects, for business reasons, to negotiate or agree to provide network elements that are mandated by neither section 251 nor section 271,[326] such agreements are not subject to state filing, arbitration, or approval. The Commission has made clear that state filing requirements are limited to agreements pertaining to section 251 obligations.[327] Similarly, court decisions have taken as a given that states' section 252 jurisdiction is limited to issues covered by section 251; the only exceptions are "conditions required to implement" agreements to provide section 251 elements (such as enforcement and compensation provisions),[328] and other issues voluntarily included by the ILEC in negotiations for section 251 elements.[329] Thus, there is no basis for state jurisdiction over agreements not subject to either section 251 or 271.

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323 Section 271 specifically grants states a "consultative" role, but otherwise places all authority in the FCC. 47 U.S.C. § 271(d)(2)(B).

324 47 U.S.C. § 271(d)(3).

325 47 U.S.C. § 271(d)(6).

326 For example, in April 2004 Qwest negotiated a commercial agreement with Covad for line sharing, which is not a UNE pursuant to section 251. *See* Qwest, Covad Reach Agreement, Denver Business Journal, April 15, 2004, *available at* <http://denver.bizjournals.com/denver/ stories/2004/04/12/daily41.html>.

327 *See, e.g., Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1), Memorandum Opinion and Order,* 17 F.C.C.R. 19337, 19340-41, para. 8 (2002) (limiting the state filing and approval requirements to agreements creating an ongoing obligation pertaining to issues enumerated in section 251).

328 *MCI Telecommunications Corp. v. BellSouth Telecommunications Inc.,* 298 F.3d 1269, 1274 (11th Cir. 2002) (noting that allowing a state to arbitrate "any issue raised by a moving party" would be "contrary to the scheme and text of the statute, which lists only a limited number of issues on which incumbents are mandated to negotiate," but permitting states also to arbitrate conditions required to implement such agreements).

329 *Coserv Limited Liability Corp. v. Southwestern Bell Tel. Co.,* 350 F.3d 482, 487 (5th Cir. 2003).